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IN THE
SUPREME COURT OF THE UNITED STATES
FALL TERM, 1984

AUVERGNE d'ANTIGNAC,
PETITIONER,
versus
UNITED STATES OF AMERICA,
RESPONDENT.
CASE NUMBER _____

PETITION FOR A WRIT OF CERTIOARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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I. QUESTIONS PRESENTED FOR REVIEW

I. Should a defendant convicted solely on the testimony of an accomplice who was later convicted of perjury at the defendants trial be saddled with the untenable burden of proving that the Government knew or should have known that their witness was lying at the time?

II. Is it every judicially permissable for a United States District Judge to rule that the same perjured testimony was material so the perjuror could be tried as per 18 USC 1621 and then later deny a Motion To Vacate filed by the convicted defendant because the perjury was not material to the conviction?

III. Can an Appellant Court ignore an estab ished precident, based on a decision by The United States Supreme Court, in their decision affirming a United States District Court decision?

IV. Would the "untainted administration of justice" allow a conviction based solely on the testimony of an un-indicted co-conspirator who lied to the jury about his own prior criminal conduct to stand irrespective of the legal technicalities involved?

V. Did the level of misconduct of the Government in the instant case reach the level characterized as outrageous by the Supreme Court in Russell necessary to invoke a Due Process violation as per the Fifth Amendment to our Constitution?

VI. If the affirmation of an appeal of a criminal conviction is later found to rest partially on false testimony given by an agent of the Government who was a witness at the trial, and to rest partially on testimony by this agent which has not been proven false, should the conviction be allowed to stand?

IN THE
SUPREME COURT OF THE UNITED STATES
FALL TERM, 1984.

CASE NO. _____

AUVERGNE d'ANTIGNAC, Petitioner

V

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The Court Below issued no opinion in their affirmation of the District Court's decision. The Order of the District is reproduced as Exhibit A. The transcript of the hearing conducted by the District Court is reproduced as Exhibit B. The Eleventh Circuit affirmation is dated July 16, 1984, and is offered as Exhibit C.

JURISDICTION

The judgement of the Court of Appeals was rendered on July 16, 1984. This Court's jurisdiction is envoked under 28 USC 1254 (1) and Rule 17 (a), Rules of The Supreme Court. Since the original Motion was filed as a habeas (2255) and under 28 USC 1651 (a), the ninety day time limit for filing civil cases would apply.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION, AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously ascertained by law, and to be informed of the nature of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 33

The Court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgement if entered, take additional testimony and direct the entry of a new judgement. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years of the final judgement, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7 day period.

FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 35

The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time period provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmation of the judgement or dismissal of the appeal, or within 120 days after entry of any order or judgement of the Supreme Court denying review of, or having the

effect of upholding a judgement of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.

18 UNITED STATES CODE 1621, PERJURY GENERALLY

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truely, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any *material* matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

FACTS

This case began in the early hours of June 10, 1978 with the seizure of the Little Hornet, a shrimp boat loaded with contraband marijuana, in the Southern District of Georgia. Rather than prosecute the owner of the boat, Jack Gore, the Government elected to immunize Gore and use his testimony to convict five other co-conspirators including petitioner, Auvergne d'Antignac. Interestingly, another of Gore's shrimp boats, the Stonefield Lady, was found adrift in the Atlantic two weeks subsequent to the seizure of the Little Hornet. Investigation proved that the Stonefield Lady had been used to smuggle a cargo of marijuana into the United States, and that an attempt to sink the Lady had failed.

Jack Gore was presented to the instant jury by the Government of a businessman who had been led astray by the "get rich scheme" of petitioner. For this presentation to be believed by the jury it was imperitive that Gore not be implicated in any other smuggling ventures. When asked by defense attorneys about the marijuana on the Stonefield Lady, Gore denied any knowledge of this cargo, placing the blame on his Captain, one Jim Gentilly, whom he could not produce at the trial. (Gentilly was later found to be a figment of Gore's imagination).

Two years and one day after the instant conviction was finalized by this Honorable Court, 450 US 967, the prosecutor, Mr. William McAbee, notified petitioner that it appeared that Jack Gore had lied at the trial when he denied knowledge of the Stonefield Lady being used to smuggle marijuana into the United States. Since this amounted to perjury concerning prior criminal conduct of the only Government witness who offered testimony connecting petitioner to the charged criminal conspiracy, petitioner sought legal remedies for his situation.

Immediately after Gore's Indictment for perjury was handed down, the trial judge, the Honorable Anthony A. Alaimo, acting on a two year old Motion To Reduce Sentence as per *Rule 35, Federal Rules of Criminal Procedure*, modified petitioner's sentence to time served and released him from confinement.

Judge Alaimo refused to return any portion of the $50,000 fine petitioner was forced to pay before securing post conviction bond, and left intact the special parole term imposed at the trial.

Since the two year time limit prescribed by *Rule 33, Federal Rules of Criminal Procedure*, had expired by one day when petitioner was notified of Gore's perjury, petitioner was forced to seek relief under the more stringent habeas corpus doctrines. To obtain relief under habeas petitioner must prove that the Government knew or should have known Gore was lying at the trial, an impossibility.

Jack Gore was indicted, tried and convicted of perjury, a violation of *18 USC 1621* in summer of 1983. For this prosecution to take place it had to be determined by the trial judge, the same Honorable Anthony A. Alaimo, that Gore's perjured statements were material to the convictions obtained. Judge Alaimo ruled at a pre trial hearing the perjured statements were material to the convictions.

On August 25, 1983, a hearing was held by Judge Alaimo on petitioner's Motion To Vacate (See Exhibit B, Transcript of this Hearing). When Judge Alaimo was made aware of a Supreme Court case directly on point with the instant argument he stated "you take it (the Supreme Court precident) up to the Eleventh (Circuit Court of Appeals) and see what they say about it." Exhibit B, page 21. On August 30, 1983, Judge Alaimo issued an Order denying the Motion because "Gore's perjury was merely cummulative and was not material to the conviction. Exhibit A, page 3. This rule was made even though it was at complete loggerheads with Judge Alaimo's ruling that allowed Gore to be prosecuted under *18 USC 1621*.

Petitioner then "took it up to the Eleventh" but, after ordering oral argument, the Eleventh Circuit Court of Appeals affirmed the District Court decision with no opinion, see Exhibit C.

This most probably futile appeal to the Supreme Court of the United States followed.

SUMMARY OF THE REASONS FOR THE GRANTING OF THE WRIT

The reasons for the granting of the Writ, simply stated, are: petitioner was convicted by a jury who could not be deemed impartial since the only Government witness who connected petitioner to the charged conspiracy lied to them about his own prior criminal acts; the Government waited until the two year time limit prescribed by *Rule 33, Federal Rules of Criminal Procedure*, had expired before providing the proof of the perjury of their main witness even though "they" knew of the availability of the proof several months prior to the disclosure, forcing petitioner to seek relief under the much more strigent requirements of a habeas corpus motion that requires proof that the Government knew or should have known that perjury was being committed, a terrible burden; the District Court refused to follow an established precident of the Supreme Court even though the cases were exactly on point; the arresting officer mislead the jury, and the Courts Below.

This is not a "shot gun" argument in hope that some issue will provide relief, but six different reasons why this August Court should exercise the power granted for the supervision of the American Judicial System and correct the decision in this case as it is so far departed from the accepted and usual course of judicial proceedings that it is un-believable.

I. IS A DEFENDANT PLACED UNDER AN UNTENDABLE BURDEN BY HAVING TO PROVE WHAT THE GOVERNMENT KNEW OR SHOULD HAVE KNOWN?

The only question that the instant jury had to decide was whether or not Jack Gore, the only Government witness who connected petitioner to the charged conspiracy, was creditable. Since it has now been proven that Jack Gore misled the jury about his creditability, it would seem an easy task to void any conviction obtained with his testimony. Not so, as petitioner must prove that the Government knew or should have known Gore was lying according to the Court Below.

Any rational trier of facts knows full well that any lies told to enhance the creditability before the jury of a witness they admitted "was critical in securing the convictions", *U.S. v. d'Antignac*, 628 F2d 428, 435 (5th Cir 1980), would greatly influence the jury. Granted, the instant jury might have reached the same verdict knowing that Gore was much more involved in smuggling than he admitted to, but this is a question for the jury, not for anyone's speculation. "Only the jury can determine what it would do on a different body of evidence, and the jury can no longer function in this case." *Mesarosh v. U.S.*, 352 US1, at 12, 77 S.Ct. 1, at 7, 1 L.ED2d 1, (1956). Gore's perjury presented the Government with a definite advantage that should not be tolerated in our justice system.

The District Court held that petitioner was barred relief according to the ruling of this Court in *U.S. v. Agurs*, 427 US 97, 96 S.Ct 2392, 49 L.Ed2d 342 (1976), because "there is not a breath of suspicion that the prosecution knew Gore was perjuring himself when he denied knowledge of The Stonefield Lady's involvement in smuggling marijuana." See Exhibit A, p.3. If this is what Agurs holds (petitioner with his very limited knowledge of legalese reads Agurs differently) then this places a defendant under an unbearable load of trying to prove what our Government, in all its many agencys, knows.

Any attempt to prove what the instant prosecutor knew about his witness would fail for obvious reasons; however, there is one

unanswered question that would cause any reasonable person to think the Government doubted Gore's story about the Stonefield Lady. If Mr. McAbee truely believed that Gore was not involved, or had no knowledge of the marijuana smuggling by the Stonefield Lady, why was Gore granted immunity for his criminal actions involving this boat? It is very reasonable to assume that Mr. McAbee felt that Gore was lying and attempted to ascertain the truth. Even this failed. Petitioner asked this question at oral argumentt before the Court Below but Mr. McAbee chose to ignore it. It is also hard to believe that Mr. McAbee believed Gore's story about turning his $250,000 shrimp boat over to someone, Jim Gentilly, who he could not produce. Even Judge Alaimo remarked at Gore's perjury trial in Savannah that he felt Gentilly was a figment of Gore's imagination. If all of the above does not constitute proof that the Government should have known Gore way lying, how could a defendantt prove this? Would not the statement of Judge Alaimo that he felt that Jim Gentilly was a figment of Gore's imagination when he first heard Gore's testimony during petitioner's trial constitute proof that the Government should hve known Gore was lying?

If the rational used by Judge Alaimo and sanctioned by the Court Below in their affirmation is correct, then the "fair trial" promised defendants in the American justice system is a figment of hte imagination of the drafters of our Constitution since the Government would be allowed to use perjured testimony to sustain a criminal conviction so long as no one could prove that they knew the testimony was false. This places an untenable hardship on a defendant as the burden of proof is placed on him. Most criminal defendants that have served two years incarceration as petitioner do not have the means to conduct any type of investigation as this burden would require.

This unfair situation cries for correction by this August Court.

II. DIVERSE RULINGS

The Honorable Anthony A. Alaimo, trial judge in the instant case, was twice presented with the exact same question: was the perjury committed by Jack Gore material to the conviction obtained? His rulings constitute a crystal clear abuse of discression that the Court Below chose to ignore.

Jack Gore was charged with violating *18 USC 1621*, a Statute that clearly states that the perjury must be material for a violation to occur. The Court Below defined materiality as "whether the false testimony was capable of influencing the tribunal on the issue before it." *Barnes v. U.S.*, 378 F2d 646 (5th Cir 1967 adopted 11th Cir, *Bonner v. City of Prichard*, 661 F2d 1206 en banc 1982). Judge Alaimo ruled, at a pre-trial hearing, that the perjured statements were maintained to the convictions and allowed Jack Gore to be found guilty of perjury.

A few months later Judge Alaimo ruled on the instant Habeas Corpus Motion and denied the Motion because "such impeaching testimony was merely cumulative to other such testimony and had little to do with d'Antignac's (petitioner) guilty verdict." See Exhibit A, p. 3. This Order is not consistent with Judge Alaimo's earlier ruling.

How can such diverse rulings by the same District Judge be sanctioned? One ruling has to be in error. Since the only question presented the instant jury was whether or not Gore was creditable, the materiality of his lies about his past wrong doings is even more apparent.

Petitioner asks that this Honorable Court clarify this situation by deciding that the perjury was material and vacating the instant conviction.

III. REFUSAL TO FOLLOW UNITED STATES SUPREME COURT PRECEDENTS

In 1956 while an appeal was pending before the United States Supreme Court the Solicitor General notified the Court that there was a possibility that the main Government witness, one Mazzei, had committed perjury at the original trial since it was known that the had lied at subsequent proceedings. The Solicitor General asked that the case be remanded for a hearing to inquire into the materiality of the perjury if it in fact occurred. He felt that Mazzei's testimony at the trial was not false, only that the subsequent disclosures had destroyed Mazzei's creditability. The Supreme Court felt so strongly about the possibility of perjury that they refused to remand and reversed the conviction. This was *Mesarosh v. U.S.*, 352 U.S. 1, 77 S.Ct. 1, 1.Ed2d 1, from which the widely used "Tainted Evidence Doctrine" evolved.

The Tainted Evidence Doctrine as enuciated by Mesarosh states that a conviction based on tainted evidence cannot be allowed to stand. In Mesarosh, as well as the instant case, only one witness connected the defendant to the charged conspiracy. In both cases the Government disclosed the perjury (or the possibility in Mesarosh). Even with these simularities, Judge Alaimo felt that Mesarosh differed from the instant case. Exhibit A, p. 4 and 5. Petitioner offers that the instant case cries more ringingly for relief since there is absolutely no question that Gore lied to petitioner's jury about the only issue before the jury: was Gore creditable? The major difference in the two cases appear to be the different attitudes adopted by the Government representative and the Court hearing them.

The rational prescribed in Mesarosh has been followed in numerous decisions involving several Appellant Circuits and U.S. District Courts. In fact this is the only published opinion (even though the Court Below did not see fit to publish their decision) that differs from Mesarosh's holdings. All of the Courts, in the following Mesarosh, did not distinguish what the actions were that destroyed the creditability of the witness, when they occurred, or what the perjury concerned, they only held that

the creditability of a major Government witness had suffered and that relief was called for. They did not consider it important whether the perjured statements bore on question of guilt or innocence of a defendant as Judge Alaimo was so careful to point out in his Order in the instant case. Mesarosh held that:

> The untainted administration of justice is certainly one of the most cherished aspects of our institution . . . The dignity of the United States Government will not permit the conviction of any person on tainted testimony.

It would definitely appear that the dignity of the United States District for the Southern District of Georgia will permit a conviction to stand on any type of testimony. This should not be sanctioned in any respect.

A United States District Court within our Fourth Circuit was faced with the almost exact situation as the instant case and held:

> This is not a case, as previously stated, of the knowing and intentional use of perjured testimony by the prosecution. Rather, it is a case in which evidence unknown to the prosecution and the defense, reveals that the Government witness, Pennington, whose creditability was essential to sustain petitioner's conviction, testified falsely in denying prior criminal convictions.
>
> *U.S. v. Atkinson*, 429 F. Supp. 880, 885 (E.D. N. Car. 1977)

All will agree that there is absolutely no difference in loss of creditability of a witness who denys prior criminal convictions and a witness such as Gore who denys prior criminal conduct. Judge Butler, the Senior District Judge in Atkinson, or Judge Alaimo are wrong in their interpretation of Mesarosh.

When a DEA Agent later pled guilty to perjury and civil rights violations in an unrelated case, our Ninth Circuit felt that this subsequent disclosure tainted the Government's cases in which he testified and ordered new trials. See *William v. U.S.*, 500 F2d 105, (1974) and *Chism v. U.S.*, 436 F2d 645. Both of these decisions

are based on the rational of Mesarosh.

Our Seventh Circuit interpreted Mesarosh "to require only that the issue of truthfulness of the witness be presented "truthfully" to the Jury." *U.S. v. Small,* 335 F2d 898 (1964) Cert denied 379 US 989, 85 S.Ct. 700 (1965). Surely no one can think that the instant jury was truthfully presented with this issue when Gore was allowed to lie about his past criminal acts.

In earlier decisions the Court Below, both as the Fifth and Eleventh Circuits followed the precedent of Mesarosh. In a highly publicized case in the Southern District of FLorida, Judge Spellman voided numerous Indictments that were based on the testimony of a F.B.I. Agent who was later arrested for shoplifting. See *U.S. v. DeBernario,* 552 F. Supp. 1315. Judge Spellman felt that all the testimony given by the Agent was true but that his later criminal conduct so destroyed his creditability that dismissal was called for since his "opinion must be one most consistent with the concepts of fundamental fairness, due process, and judicial integrity." *DeBernardo* at 1329. The Fifth Circuit held that the focus of the inquiry into perjury cases was whether disclosure of the information would undermine the witnesses creditability so as to produce a reasonable doubt element. *U.S. v. Antone,* 603 F2d 566, 570 (1979). This holding is based on Argurs but is different from the holding of Judge Alaimo in the instant case. If Gore's creditability were to be destroyed there would be more than a reasonable doubt as there would not be sufficient evidence to sustain petitioner's conviction. "Mere presence at the scene of an arrest has never been a sufficient case for a conspiracy conviction in this Circuit." *U.S. v. Willis,* 639 F2d 1335 (5th Cir 1981) adopted as precedent by the Court Below, *Bonner v City of Prichard,* 661 F2d 1206, en banc (11th Cir 1982). Keep in mind that Gore was presented as a businessman led astray by the get rich quick scheme of petitioner. It is a fair assumption that a jury that knew of Gore's other smuggling ventures would never convict on his testimony alone as they did in the instant case.

Judge Alaimo refused to follow precedents of this Court. The Court Below sanctioned this act by affirming the Order. This conduct must not be condoned. This case is directly on point with

Mesarosh. If Mesarosh is wrong change it, but do not allow a District Judge to disregard controlling precedents on his own. If this were allowed our Court system would be in shambles in a very short time. Petitioner asks that this Honorable Court notice the refusal of the Court Below to follow legal precedents and issue an Order requiring that they decide the instant case based on the rational contained in Mesarosh.

IV. WILL THE UNITED STATES CONSTITUTION PERMIT A CRIMINAL CONVICTION SECURED BY A WITNESS LATER CONVICTED OF LYING TO THE JURY ABOUT HIS PRIOR CRIMINAL CONDUCT TO STAND?

Anyone even vaguely familiar with the American Criminal Justice System would most probably answer the above question in the negative, but the instant case, so far, has proven this to be the wrong answer. Petitioner, a layman unskilled in legal matters, will admit that there are several so-called technicalities relied on by the District Court that seem to preclude the vacation of his conviction. This would appear to be blatantly unfair as per the Sixth Amendment to our Constitution which guarantees an impartial jury for all defendants. How can any rational trier of facts hold that a jury that only hears one witness connect a defendant to a criminal conspiracy be impartial when that witness lies to them about his previousl involvement in an identical criminal conspiracy?

The Government presented Jack Gore as a businessman who was led astray by petitioner. For this argument to prevail the jury must believe that Gore had not been involved in previous marijuana smuggling ventures. This simple fact makes Gore's lie that he had no knowledge that The Stonefield Lady was being used to smuggle marijuana important, and much, much more than merely commulative and impeaching as Judge Alaimo held.

It would seem to petitioner that under the conditions of the instant conviction it would not make a real difference what Gore lied to the jury about. His testimony was so important, without it the conviction (if obtained) would have never have been sustained by any Court, that his believability was the only jury question presented. Simply stated, if Gore was believed, the only feasible verdict was guilty; if the jury did not believe Gore then petitioner would have been acquitted regardless of his real guilt or innocence. That is the system that we are so proud of in these United States.

Since there is absolutely no possibility the instant jury was not influenced by Gore's perjury, or would not have decided the case differently had they known of Gore's prior involvement in marijuana smuggling, no Court should hold that petitioner was tried by an impartial jury. This Honorable Court should correct this unfair situation as the previous Supreme Court did in Mesarosh.

V. GOVERNMENT MISCONDUCT

This appeal should have been a Motion For A New Trial as per Rule 33, Federal Rules of Criminal Procedure based on newly discovered evidence; the perjury of Jack Gore. To prevail petitioner had only to prove that the Court is "reasonably well satisfied" that the testimony was false, and that without the false testimony the jury "might have reached a different conclusion." *Larrison v. U.S.*, 24 F2d 82, ;87 (7th Cir 1928). This "Larrison Test" has been said to be limited to cases of "recantation or where it has been proved that false testimony was given at the trial." *U.S. v. Hiss*, 107 F. Supp. 128, 136 (S.D.N.Y. 1952) affirmed 201 F2d 372 (2nd Cir 1953), cert denied 345 US 942, 73 S. Ct. 830, (7L.Ed 1368 (1953). This Larrison Test is much easier to meet than the habeas requirement of proving the Government knew or should have known the testimony was false when the perjury occurred. *U.S. v. Jones*, 614 F2d 80 (5th Cir. 1980). Petitioner was barred from filing under the provisions of *Rule 33* because

the Government waited until one day after the expiration of the two year time limit prescribed by the Rule; an almost unbelievable coincidence. The "government" had been aware of the existence of the proof that Gore lied for a substantial time. According to Mr. McAbee he knew of the proof at least a month prior to his notifying petitioner. Other members of the prosecution team knew of the proof much longer than Mr. McAbee admitted.

The precedent involved in cases such as the instant is plain:

> In considering the use of perjured testimony this Court has declined to draw a distinction between different agencies under the same government, focusing instead upon the "prosecution team" which includes both investigative and prosecutorial personnel. See *Schneider v. Estelle*, 552 F2D 593, 595 (5th Cir 1977); *Smith v State of Florida*, 410 F2d 1349, 1351 (5th Cir 1969); *U.S. v. Deutsch*, 475 F2d 55, 57 (5th Cir 1973).
>
> *U.S. v Antone*, supra at 569

One member of the instant prosecution team was the DEA Case Agent, Mr. Gordon Raynor. Mr. Raynor knew of the availability of the proof that Gore lied no later than Septenber 29, 1982, the date James A. Hastings, the last witness against Gore testified before the Special Grand Jury, but did nothing to cause this information to be released to petitioner. As early as March of 1981 Mr. Raynor told petitioner that "they" knew Gore had lied at the trial. Since Agent Raynor did not tell petitioner what these lies concerned, and petitioner knew that Gore had lied numerous times at the trial, this general statement was useless in a Court of Law. In September of 1982 Agent Raynor told petitioner that Gore had lied about the Stonefield Lady, but no proof was offered to substantuate this statement at this time.

Petitioner is not alleging that Mr. McAbee acted in bad faith, only that he was severly prejudiced by this untimely disclosure. You (The Supreme Court) have faced this exact issue and held:

> When reliability of a given witness may well be determinative of guilty or innocence, nondisclosure of evidence affecting creditability falls within the rule that

> supression of material evidence justifies a new trial irrespective of good faith or bad faith of the prosecution.
>
> *Giglio v U.S.*, 405 US 150 92 S.Ct. 763, 31 L.Ed2d 104 (1972).

This conclusion that Mr. McAbee's intentions are not at issue; only the unarguable fact that the delay prejudiced petitioner's appeal chances and required that he meet much more strigent requirements of habeas actions. This cannot and should not be condoned under any circumstances.

This August Court recognized the chance that Government misconduct could result in a due process violation as early as 1973 in *U.S. v Russell*, 411 US 423, 93 S.Ct. 1637, 36 L.Ed.2d 366. The Ninth Circuit recently declined prosecution due to misconduct by a Government informer. See *U.S. v Batres-Santolino*, 521 F. Supp. 744 (N.D. Cal 1981). The Eleventh Circuit (the Court Below) recognized the possibility of misconduct voiding convictions in *U.S. v Tobias*, 662 F2d 381 (1981). A panel member, the Honorable Frank Johnson, would have voided Tobias.

If your prediction in *Russell* is to have any meaning, there must be some level of conduct that is deemed outrageous. The instant case should be a prime example of such a case. A very recent California jury, in DeLorian, refused to convict because the conduct of the Government was undesirable. You should do the same in the instant deplorable situation.

VI. THE TAINTED TESTIMONY OF CUSTOMS PATROL OFFICER DWANE SWIGERT.

The original arrest in the instant was made by Custom Patrol Officer Dwane Swigert, who became a member of the "prosecution team". In support of this "seizure", Officer Swigert testified that his suspicion was aroused by "the erratice movements of the vessel in the Intercoastal Waterway late at night; there were no other vessels in the vicinity either before, during or

after the sighting and subsequent boarding; he went to investigate and found a shrimp boat bearing the name Little Hornet pulling into the dock; to his knowledge coastal shrimping was out of season; he had received prior information that the Little Hornet was suspected by the U.S. Custom Service of being involved in smuggling contraband; he had not seen her in the Velona dock area at all during the spring of 1978." *U.S. v d'Antignac*, supra at 434. Judge Alaimo held that the elimination of the shrimping season factor, petitioner had proven that the season was open rather than closed as Officer Swigert alleged, would not have affected the reasons for affirming the seizure.

The panel that affirmed the original appeal relied on the false allegation that the Little Hornet was a shrimp boat moving about late at night when shrimping was not in season no less than eight times in their opinion. The Honorable Thomas A. Clark went even further in his special concurrence:

> . . . he (Officer Swigert) also considered that this was a shrimp boat coming into a dock on the Atlantic from parts unknown, when coastal shrimping was not in season . . . I think this fact, when coupled with the facts relied upon by the majority, gave the officers sufficient grounds to board the vessel.
>
> *U.S. v d'Antignac*, supra at 437

There can be no doubt which incident that led to the seizure was most important to Judge Clark. Petitioner feels that this falsehood was heavily relied on by the other panel members.

There can be no argument as to "know or should have known" in regards to Officer Swigert's false testimony. He was a member of the "prosecution team" and should have known if his testimony was true or false. Surely petitioner would not be burdened with attempting to prove the "Government" should have known this testimony was false as he was with Jack Gore's perjury.

Since the instant seizure was based primarily on a false impression by the arresting officer, the seizure must be declared void as per the Fourth Amendment and the evidence (the marijuana) thrown out. This would void the instant conviction.

CONCLUSION

A prior decision of this Court, followed by numerous Appellant Circuits, dictates that the reasoning of the Court Below is flawed. The Supervisory Powers of this Court should be exercised to correct this situation. For these and other foregoing reasons, petitioner Aubergne d'Antignac respectfully requests that a writ of certiorari issue to review the judgement of the Eleventh Circuit of Appeals.

Respectfully Submitted

Auvergne d'Antignac

Auvergne d'Antignac, Pro Se.
P.O. Box 300
Crescent, Georgia 31304

DATED: October 10, 1984

PROOF OF SERVICE

I, the undersigned, hereby certify that pursuant to Rule 28.4 of the Supreme Court I served a copy of the Petition For A Writ Of Certiorari to the Eleventh Circuit of Appeals by mailing same, postage prepaid, to:

OFFICE OF THE SOLICITOR GENERAL
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

on this 11th day of October, 1984.

Auvergne d'Antignac
P.O. Box 300
Crescent, Georgia 31304

EXHIBIT A

JUDGE ALAIMO'S ORDER DENYING THE MOTION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

AUVERGNE d'ANTIGNAC,	:	CIVIL ACTION
Plaintiff	:	
V.	:	
UNITED STATE OF AMERICA,	:	
Defendant	:	NO. 283-96

ORDER

On May 18, 1983, Auvergne d'Antignac petitioned the Court, pursuant to 28 U.S.C. §2255, to vacate, set aside or correct the sentence imposed upon him in 1978 upon his conviction of a drug-smuggling conspiracy. *See U.S. v. d'Antignac,* 628 F.2d 428 (5th Cir. 1980), *cert, denied* 450 U.S. 967 (1981). Because of his fear that the lapse of a long period of time since his conviction might undermine his claim under §2255, d'Antignac seeks, alternatively, *coram nobis* relief, pursuant to the All Writs Act, 28 U.S.C. §1651 (a). Since the Court is of the opinion that he is not entitled to any relief, without regard to the lapse of time, it is unnecessary to determine whether he is proceeding timely under §2255.

While d'Antignac is no longer in physical custody, he is presently serving the parole portion of his sentence and is entitled to have his claim considered. *See Jones v. Cunningham,* 371 U.S. 236 (1963).

Simply stated, d'Antignac claims that his conviction was procured by perjured testimony, which only recently has come to light and resulted in a conviction of the perjurer. Thus, he reasons, he is absolutely entitled to a vacation of the conviction and a new trial. After carefully reviewing the entire record in the criminal case (CR 278-38-1, S.D.Ga.), as well as the evidence and argument adduced at the evidentiary hearing on the instant §2255 motion, the Court is of the opinion that the conviction should not be disturbed.

THE FACTS

The facts of this case are graphically set forth in a plenary fashion in the opinion of the Court of Appeals at 628 F.2d 428, 430-434 (5th Cir. 1980). It would serve no useful purpose to restate them here. The Court of Appeals' opinion recited that the evidence of guilt was overwhelming. Moreover, d'Antignac, in numerous letters to this Court following incarceration in which he successfully sought Fed.R.Crim.P. 35 reduction of sentence, repeatedly admitted his guilt. In addition, he conceded his guilt during testimony given by him in the recent trial of *United States v. Gore,* CR 283-11, S.D.Ga. (trial of the perjurer), part of which involved a conviction of Gore for perjuring himself in the trial of d'Antignac.

Accordingly, the guilt of this defendant is not in doubt and cannot, for that reason alone, be an issue in the within §2255 action. What remains is a contention that d'Antignac was denied due process of law because an unindicted co-conspirator lied on a

collateral matter during d'Antignac's trial. The evidence showed that Gore, the perjurer, had received extensive immunity which covered the shrimp boat involved in d'Antignac's trial as well as another boat belonging to Gore, The Stonefield Lady. In order to impeach Gore, defendants sought to show that The Stonefield Lady had been scuttled by Gore to hide another unrelated smuggling venture. It is undisputed that Gore lied when he denied the illegal use of The Stonefield Lady, and he was later convicted of perjury for that lie.

A review of the d'Antignac record shows, however, that such impeaching testimony was merely cumulative to other such testimony and had little to do with d'Antignac's guilty verdict. "The recent case of *United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), provides the standard of materiality of undisclosed evidence. The omitted [perjured] evidence must create a reasonable doubt of guilt that did not otherwise exist in order to justify a new trial." *United States v. d'Antignac, supra* at 436. Such a rule would, *a fortiori,* bar relief here where there is not even a breath of suspicion that the prosecution knew Gore was perjuring himself when he denied knowledge of The Stonefield Lady's involvement in smuggling marijuana. There simply cannot be any due process violation here.

Another ground urged by d'Antignac is that the finding of probable cause by the Court of Appeals for the boarding of the marijuana-laden shrimp boat (upon which the sufficiency of the evidence to support the verdict rested) was undermined because one

of the factors upon which it was based was false; *i.e.*, that movements of the vessel in the intercoastal waterway late at night when coastal shrimping was out of season were suspicious. d'Antignac contends and offers proof that coastal shrimping was *not* out of season at that time and that, thus, the presence of the vessel at that time whoudl not have created any suspicion.

The Court of Appeals' recitation of the factors as supporting a finding of reasonable suspicion, without considering the shrimping season, were more than ample to support a finding of reasonable suspicion:

> The facts known to Officer Swigert included the following: He observed the erratic movements of the vessel in the Intercoastal Waterway late at night for approximately one hour; there were no other vessels in the vicinity either before, during or after the sighting and subsequent boarding; he went to investigate and found a shrimp boat bearing the name Little Hornet pulling into the dock; to his knowledge coastal shrimping was out of season; he had received prior information that the Little Hornet was suspected by the United States Customs Service of being involved in smuggling contraband; he had not seen her in the Valona dock area at all during the spring of 1978.

United States v. d'Antignac, supra at 434. It is beyond doubt that the elimination of the shrimping-season factor would not have attenuated the basis for a reasonable suspicion justifying the boarding of the Little Hornet.

Counsel for d'Antignac orally cited the case of *Mesarosh v. United States,* 352 U.S. 1, 1 L.Ed.2d 1, 77 S.Ct. 1 (1956), in support of his position that the defendant is entitled to relief. *Mesarosh* was a case wherein the defendant was convicted of violating the Smith Act by conspiring to advocate the overthrow of the federal

government by force and violence. During oral argument before the Supreme Court, the Solicitor General informed the Court that one Mazzei, hired by the Government to infiltrate the Communist Party, probably lied during the prosecution of the defendant when he testified as to acts showing the defendant's guilt, because he, Mazzei, had lied in other similar proceedings. There, the Chief Justice, in a four-to-three decision, was careful to point out that the Government was the moving party in disclosing the unreliability of the testimony by the informer and that the tainted evidence bore on the testimony by the informer and that the tainted evidence bore on the question of the defendant's guilt, nor was any question raised as to the accuracy of Gore's testimony implicating d'Antignac in the Little Hornet incident. We are dealing here "with a motion for a new trial initiated by the defense, under Rule 33 of the Federal Rules of Criminal Procedure, presenting untruthful statements by a Government witness subsequent to the trial as newly discovered evidence affecting his credibility at the trial. Such an allegation by the defense ordinarily will not support a motion for a new trial, because new evidence which is 'merely cumulative or impeaching' is not, according to the often-repeated statement of the courts, an adequate basis for the grant of a new trial." *Mesarosh, supra* at 9.

During oral argument, d'Antignac sought additional modification of his sentence because of inaccurate information in the presentence report. The report described him as an organizer of the importation scheme and a notorious smuggler in this area. While this description was later determined to be false, it played no part in the Court's sentence. Moreover, at the time the Court modified d'Antignac's sentence by Order of May 10, 1983, this error in the report was well known; and, since it did not contribute to the severity of the initial sentence, it was not mentioned as a factor persuading the Court to reduce his sentence.

Accordingly, the motion to vacate the sentence is hereby DENIED.

SO ORDERED, this 30th day of August, 1983.

ANTHONY A. ALAIMO
CHIEF JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

EXHIBIT B

TRANSCRIPT OF THE HEARING ON THE MOTION TO VACATE BEFORE JUDGE ALAIMO.
(cited portion)

THE COURT: That is what this is all about.

MR. ZIPPERER: My point is entirely based on the reasoning in *Mesarash*, Your Honor, which was this --

THE COURT: Well --

MR. ZIPPERER: --and the Court said in that case --

THE COURT: Well, I tell you, you take it up to the Eleventh and see what they say about it.

MR. ZIPPERER: All right, sir.

THE COURT: I mean, I am going to review the case again, but my present view is, really, that he is not entitled to relief.

MR. ZIPPERER: I understand that, Judge. I only ask the Court to do one thing. I'm sure it's going to do it anyway. But I would consider myself successful if I can encourage the Court to take a glance at the transcript and a glance at the *Mesarash* reasoning and apply that to the situation with Gore, because I really think the reasoning of the Supreme Court had nothing to do, and it says it has nothing to do, with guilt or innocence or whether part of the testimony was truthful and part perjured. I think that case says, Your Honor, that when the Government is going to use a witness, it's the duty of the judiciary to encourage the Government to be careful, cautious, not be conned --

THE COURT: Oh, I think they were in this case. I do not think there is any question about that. If there was

the slightest hint as to that, that would be something else, but here if there was any over-reaching, the witness did it of the Government more than the defendant, you know.

MR. ZIPPERER: I wholeheartedly agree that this witness took-in the Government.

THE COURT: He did not over-reach the defendant. And that is another thing. But I will re-read the *Mesarash* case.

MR. ZIPPERER: Thank you, Your Honor.

MR. D'ANTIGNAC: May I just ask one quick question, Your Honor?

THE COURT: Sure.

MR. D'ANTIGNAC: Do you think that if the jury had known that Mr. Gore had perjured himself in any part of my trial, that they would have reached the same verdict?

THE COURT: Yes, They did not place a lot of stock in him. You watched him; I did. And I watched Gore -- for gosh sakes, why the Government would ever make a deal with a man like him, I do not know -- from what he produced in that case -- because frankly, if they had come up and said that he had reneged on his agreement, I believe I would have sustained them, because that jury did not place any stock in Jack Gore. And you know that community did not place any stock in Jack Gore, better than anybody. In fact, one of the greatest disgraces to the federal governmentt is that he was walking

around loose all these years, as far as I am concerned. But that is basically the problem in this case, but I will still read your case.

MR. ZIPPERER: Thank you, sir.

THE COURT: I am not telling you that I will not change my mind. My present belief is that the motion should be denied, but I will review it.

MR. ZIPPERER: Thank you, Your Honor.

END OF PROCEEDING.

EXHIBIT C

OPINION OF THE COURT BELOW AND DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

UNITED STATES OF AMERICA	:	CIVIL ACTION
	:	NO. 283-96
	:	COURT OF
	:	APPEAL NO.
AUVERGNE d'ANTIGNAC	:	83-8650

ORDER

The judgment of this Court in the above-styled action having been affirmed by the United States Court of Appeals for the Eleventh Circuit,

IT IS HEREBY ORDERED that the judgment of the Eleventh Circuit is made the judgment of this Court.

SO ORDERED, this 11th day of August, 1984.

Anthony A. Alaimo
Chief Judge, United States
District Court, Southern District
of Georgia

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-8650

D.C. Docket No. CV283-96

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

AUVERGNE d'ANTIGNAC,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Georgia

(July 16, 1984)

Before KRAVITCH and CLARK, Circuit Judge, and ALLGOOD*, District Judge.

PER CURIAM: AFFIRMED. See Circuit Rule 25.

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*Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

Judgment Entered: July 16, 1984
For the Court: Spencer D. Mercer, Clerk

By: Deputy Clerk

Office-Supreme Court, U.S.
FILED
FEB 4 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-587 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1984

AUVERGNE D'ANTIGNAC, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was deprived of due process by the district court's failure to reverse his conviction on the ground that one of the government's witnesses was later convicted of perjuring himself at petitioner's trial.

2. Whether, when one of a myriad of factors relied upon to justify a Customs officer's decision to board a vessel later proved erroneous, the remaining factors still furnished reasonable suspicion for the boarding.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-587

AUVERGNE D'ANTIGNAC, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 2c) is unreported. The district court's opinion (Pet. App. 1a-6a) also is unreported. The opinion of the court of appeals on petitioner's direct appeal is reported at 628 F.2d 428 (5th Cir. 1980), cert. denied, 450 U.S. 967 (1981).

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1984. The petition for a writ of certiorari was filed on October 11, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Georgia, petitioner and four other defendants were convicted on all four counts of an indictment charging conspiracy to import 28,310 pounds of

marijuana, in violation of 21 U.S.C. 963; importation of the marijuana, in violation of 21 U.S.C. 952(a); conspiracy to possess the marijuana with intent to distribute it, in violation of 21 U.S.C. 846; and possession of the marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to a total of ten years' imprisonment, to be followed by a ten-year special parole term. He also was fined a total of $50,000.[1]

1. The evidence at trial showed that in early 1978, petitioner approached Jack Gore, an unindicted co-conspirator who testified for the government, regarding a "get-rich-quick" scheme. The scheme involved using one of Gore's several shrimp boats, the *Little Hornet*, to transport a large shipment of marijuana from Colombia to the United States. Gore's boats were docked near Valona, Georgia, at a dock he had purchased known as the old Kittles's Dock. *United States* v. *D'Antignac*, 628 F.2d 428, 430 (5th Cir. 1980), cert. denied, 450 U.S. 967 (1981).

Petitioner and Gore met in Fort Myers, Florida, to make final plans and to load the *Little Hornet* with supplies for the trip to South America. The *Little Hornet* departed for Colombia in late May 1978. During the time just before her departure and continuously thereafter, petitioner and Gore communicated with each other by use of a rudimentary telephone code. According to their plan, Gore would have nothing more to do with the shipment except pilot the *Little Hornet* into Kittles's Dock upon her return from Colombia. *United States* v. *D'Antignac*, 628 F.2d at 430.

The *Little Hornet* returned from Colombia loaded with marijuana, and on June 8 she was about 20-30 miles off the coast of Mayport, Florida. That evening, Gore and several

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[1]When petitioner had served two years and one month in prison, the district court, acting under Fed. R. Crim. P. 35, reduced petitioner's sentence of imprisonment to time served.

others boarded the *Miss Shantell* and headed toward the *Little Hornet*. The two vessels rendezvoused at about noon the next day, June 9. Following a brief discussion between Gore and crew members of the *Little Hornet*, the two vessels headed for Sapelo Sound, off the Georgia coast. Once they reached the Sound, Gore boarded the *Little Hornet*, as planned, and piloted her through the Intracoastal Waterway to Kittles's Dock. *United States* v. *D'Antignac*, 628 F.2d at 430-431. During that journey, petitioner pulled alongside the *Little Hornet* in a smaller boat to unload a small amount of marijuana from the *Little Hornet* (Trial Tr. 89-91). Arriving at Kittles's Dock in the *Little Hornet* at about 11 p.m., Gore's task was complete. *United States* v. *D'Antignac*, 628 F.2d at 431.

Petitioner appeared at the dock, and he and his co-defendants began to string up lights to assist in their unloading of the vessel. Their plans were altered, however, when the truck into which they planned to load the marijuana ran into a utility pole, knocking out all the lights and power. Petitioner telephoned Gore and told him that the *Little Hornet* would be leaving Kittles's Dock. Then, still loaded with marijuana, the *Little Hornet* started a return journey to the Intracoastal Waterway. *United States* v. *D'Antignac*, 628 F.2d at 431.

At about midnight on June 9, Customs Officer Duane Swigert was at Brannen's Dock in Belleville, Georgia, awaiting the return of other officers investigating an unrelated matter. As he waited, Officer Swigert surveyed the area and observed a light atop the mast of a vessel out in the Intracoastal Waterway, about four miles away. He watched the vessel for about one hour, and he saw it move continuously north and south, changing its course between the lighted channel markers several times before finally heading in toward the Valona dock area. His suspicions aroused by the boat's erratic movements and the lateness of the hour,

Officer Swigert decided to investigate. He and other officers drove five miles to the Valona dock area, losing sight of the mastlight at several points along the way. *United States* v. *D'Antignac,* 628 F.2d at 431.

Once he arrived at the dock area, Officer Swigert and his colleagues turned off their automobile lights. They saw the *Little Hornet,* her name clearly legible on her hull, pull into the dock. Officer Swigert had received an office memorandum indicating that Gore's shrimp boats, including the *Little Hornet,* were suspected of being involved in drug smuggling. That information, coupled with his belief that the coastal waters were then closed for shrimping, increased Officer Swigert's suspicions, and he decided to investigate further. *United States* v. *D'Antignac,* 628 F.2d at 431.

After the *Little Hornet* docked, Officer Swigert approached the vessel, identified himself, and boarded the boat. When he had taken only one step to the doorway of the pilothouse, he saw a large, partially opened bale at his feet. After inspecting and smelling a quantity of the leafy green substance he saw in plain view, he determined it was marijuana and arrested the crew members. The officers then conducted a search of the cargo hold and discovered the 28,310 pounds of marijuana. *United States* v. *D'Antignac,* 628 F.2d at 431.

After the vessel and its passengers had been secured and Officer Swigert and another officer were leaving the dock area, Officer Swigert saw a van carrying petitioner and two others turn into the dock area. Thinking that the van might be arriving to unload the marijuana, Officer Swigert stopped the van and questioned its passengers about their identities. Receiving evasive answers and observing that one of the passengers was armed, Officer Swigert arrested petitioner and the other passengers as suspects in connection with the marijuana found on board the *Little Hornet.* *United States* v. *D'Antignac,* 628 F.2d at 432.

2. The court of appeals affirmed petitioner's conviction. *United States* v. *D'Antignac, supra.* The court held first that Officer Swigert's investigatory boarding and search of the *Little Hornet,* and the subsequent arrest of the occupants of the van, were not violative of the Fourth Amendment, and it thus upheld the denial of petitioner's motion to suppress the marijuana. The court of appeals ruled that the validity of the investigatory boarding and search in this case was dictated by *United States* v. *Serrano,* 607 F.2d 1145, 1148 (5th Cir. 1979), cert. denied, 445 U.S. 965 (1980), which held that Customs officers may make an investigatory stop of a vessel in inland waters adjacent to the open Gulf of Mexico under 19 U.S.C. 1581(a) on facts that justify a reasonable suspicion of illegal activity. Reviewing the facts known to Officer Swigert in this case, the court concluded that his investigatory boarding of the *Little Hornet* and his stop of the van as it turned into the dock area were supported by reasonable suspicion. *United States* v. *D'Antignac,* 628 F.2d at 432-435.

The court of appeals also rejected petitioner's objection to Gore's testimony on the ground that it was perjured and was the product of an undisclosed promise made to him by the government. The court first noted that it was not at all clear that Gore had perjured himself because his entire line of testimony was by way of recollection and " 'to the best of my ability.' " *United States* v. *D'Antignac,* 628 F.2d at 435. Furthermore, the purpose of the mid-trial conference between Gore and the prosecutor that had given rise to petitioner's suspicion of an alleged hidden agreement with the government was merely to inform Gore that he need not identify a person only by visual means and that a voice identification was permissible. *Ibid.* In addition, the jury was aware of the government's immunity agreement with Gore; the court of appeals described that agreement as including immunity from prosecution for events arising

from the *Little Hornet* smuggling scheme, as well as a different smuggling scheme involving another one of Gore's boats, the *Stonefield Lady;* a promise to release an $11.5 million tax lien; and the return of the *Little Hornet. Id.* at 435 & n.9.[2] Thus, the jury was fully informed on the subject of Gore's credibility, and the jury was properly instructed on that issue. *Id.* at 435-436 & n.10. The court of appeals therefore concluded that the alleged error was not material to the outcome of the verdict. *Id.* at 436.

The court of appeals also rejected petitioner's argument that the district court erred in failing to require full compliance with his discovery requests. The court noted that the requested information related only to alleged drug smuggling aboard the *Stonefield Lady.* Thus, the evidence was not exculpatory but was at most cumulative evidence regarding Gore's credibility. *United States* v. *D'Antignac,* 628 F.2d at 436. The court also held that petitioner's reliance on *Brady* v. *Maryland,* 373 U.S. 83 (1963), was inapt because the evidence allegedly withheld was not material to guilt or innocence and would not have created any reasonable doubt that did not otherwise exist (see *United States* v. *Agurs,* 427 U.S. 97 (1976); *Giglio* v. *United States,* 405 U.S. 150, 154 (1972)). In any case, the court of appeals concluded that even if the withheld material had included evidence material to guilt or innocence, it would still uphold the district court's ruling because petitioner was unable to articulate his dissatisfaction with the government's

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[2]In fact, the immunity agreement did not mention the *Stonefield Lady* at all. The agreement was phrased in terms of dates, *i.e.,* immunity from prosecution for any drug-related offenses committed through June 10, 1978. (A copy of the immunity agreement is reproduced as an Appendix to this brief.) As matters turned out, the agreement was broad enough to encompass an incident involving the *Stonefield Lady,* but there is no indication that it was drafted with that incident in mind. See page 11, *infra.*

production of over 340 pages of records except to state that the amount was insufficient. *United States* v. *D'Antignac,* 628 F.2d at 436-437.[3]

This Court denied petitioner's petition for a writ of certiorari in which he challenged the stop of his van as well as the warrantless search of the *Little Hornet.* 450 U.S. 967 (1981).

3. On or about January 31, 1983, the United States Attorney's Office for the Southern District of Georgia learned that a special grand jury was considering returning an indictment against Gore. The United States Attorney's Office had been unaware of the nature of the grand jury's investigation because the special grand jury was being conducted by lawyers from the Department of Justice in Washington, D.C. and was supervised by a judge from outside the Southern District of Georgia. As a result of a request for information, the United States Attorney's Office received copies of the relevant grand jury testimony on March 2, 1983. The next day, the government filed a notice of disclosure advising all defendants, including petitioner, that it had obtained evidence that Jack Gore had perjured himself in the trial of this case.[4]

On May 18, 1983, petitioner filed a motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence (Pet. App. 1a). Alternatively, he sought coram nobis relief under the All Writs Act, 28 U.S.C. 1651(a) (Pet. App. 1a). Because the government's disclosure notice was filed on March 3, 1983, two years and one day after this Court had denied

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[3]The court of appeals also rejected petitioner's claim that the district court erred in denying his motion to dismiss the indictment based upon his challenges to the arrays of the grand and petit juries under the Sixth Amendment and the Jury Selection and Service Act of 1968, 28 U.S.C. 1861-1869. *United States* v. *D'Antignac,* 628 F.2d at 437.

[4]Jack Gore was subsequently convicted of the perjury he committed at petitioner's trial, and his conviction was affirmed. *United States* v. *Skinner,* 747 F.2d 708 (11th Cir. 1984).

petitioner's certiorari petition, petitioner claimed that he was barred by the two-year time limit of Fed. R. Crim. P. 33 from moving for a new trial based on newly-discovered evidence.[5]

The district court ruled that, regardless of the timing of petitioner's request, he was not entitled to any relief (Pet. App. 1a). After reviewing the record of the original trial and the evidence and argument offered at the hearing on petitioner's motion, the court rejected petitioner's argument that his conviction should be overturned on account of Gore's perjured testimony (*id.* at 1a-6a).

Gore's perjured testimony at petitioner's trial was his denial that the *Stonefield Lady,* another of his shrimp boats, was sunk while engaged in a marijuana importation scheme. The district court ruled that the evidence that the *Stonefield Lady* actually had been involved in drug smuggling was simply cumulative impeachment evidence (Pet. App. 2a-3a). At trial, the evidence showed that Gore had received immunity from prosecution for drug-related offenses (see pages 5-6 & note 2, *supra*). Petitioner and his co-defendants had tried to show that the *Stonefield Lady* had been scuttled by Gore to hide another unrelated smuggling venture. Because the new impeaching testimony was cumulative of other testimony relative to Gore's credibility and had no bearing on petitioner's guilt,[6] the district court

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[5]Petitioner concedes (Pet. 15) that he was told in September 1982 by DEA Agent Gordon Raynor, the case agent at his trial, that Gore had lied when he testified at petitioner's trial. Petitioner offers no satisfactory explanation for his failure to file a timely motion for a new trial based on Raynor's information.

[6]The district court noted that the court of appeals had considered the evidence against petitioner overwhelming. *United States* v. *D'Antignac,* 628 F.2d at 436. Moreover, after he was in custody, petitioner had, in several letters to the district court in which he sought reduction of his sentence, repeatedly admitted his guilt (Pet. App. 2a). That the perjured

ruled that it did not satisfy *Agurs's* requirement that the omitted perjured evidence must create a reasonable doubt that did not otherwise exist in order to justify a new trial (Pet. App. 3a (citing *United States* v. *D'Antignac*, 628 F.2d at 436)). In the circumstances of this case, therefore, the district court ruled that due process was not violated.

The district court also rejected petitioner's claim that Officer Swigert's boarding of the *Little Hornet* was unjustified because one of the factors supporting his suspicions turned out to be erroneous. Petitioner demonstrated that shrimping was not out of season, as Officer Swigert had thought, and thus petitioner argued that any inferences based on the fact that the *Little Hornet* was a shrimper were unreasonable. Pet. App. 3a-4a. The district court simply concluded that the panoply of factors supporting Officer Swigert's reasonable suspicion was more than adequate to uphold the finding of reasonable suspicion, without regard to the shrimping season factor. *Id.* at 4a (citing *United States* v. *D'Antignac*, 628 F.2d at 434).

The court of appeals affirmed in a judgment order without opinion (Pet. App. 2c).

ARGUMENT

1. Petitioner contends (Pet. 7-14) that he was deprived of a fair trial because the jury was unaware that Jack Gore had lied when he denied the use of the *Stonefield Lady* for a drug smuggling operation. Petitioner argues that the jury might not have credited that part of Gore's testimony implicating petitioner in the *Little Hornet* scheme had it known of Gore's perjury with respect to the *Stonefield Lady*. We

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testimony in this case did not cast doubt on the issue of petitioner's guilt was the principal basis on which the district court distinguished *Mesarosh* v. *United States*, 352 U.S. 1 (1956), upon which petitioner relied during the Section 2255 hearing (Pet. App. 4a-5a).

submit that petitioner has not shown that he is entitled to relief under 28 U.S.C. 2255.[7]

To establish a prima facie case that a conviction should be vacated because it was obtained through the use of perjured testimony, a defendant must show both that the testimony was false and that the government knew or should have known of the falsity. *Holleman* v. *United States,* 721 F.2d 1136, 1138 (7th Cir. 1983); *Lindhorst* v. *United States,* 658 F.2d 598, 602-603 (8th Cir. 1981), cert. denied, 454 U.S. 1153 (1982); *United States* v. *Conzemius,* 611 F.2d 695, 697 (8th Cir. 1979); *United States* v. *Robinson,* 585 F.2d 274, 279 (7th Cir. 1978), cert. denied, 441 U.S. 947 (1979); see also *United States* v. *Agurs,* 427 U.S. at 103. Petitioner has clearly satisfied the first part of his burden, but he failed to present any evidence as to the second.

The district court stated that "there [was] not even a breath of suspicion that the prosecution knew Gore was perjuring himself when he denied knowledge of The Stonefield Lady's involvement in smuggling marijuana" (Pet.

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[7]While stating that he does not allege that the prosecutor acted in bad faith (Pet. 15), petitioner nevertheless suggests (*id.* at 14-16) that the government manipulated its disclosure of Gore's perjury so that petitioner was barred by the two-year time limit of Fed. R. Crim. P. 33 from seeking a new trial based on newly-discovered evidence. The record does not support this claim. Not only did the prosecutor disclose the fact of Gore's perjury the day after he learned of it, but petitioner concedes that DEA Agent Gordon Raynor informed him of the perjury in September 1982, seven months before the expiration of the two-year period. Petitioner's explanation for his failure to move for a new trial under Rule 33—the lack of proof to substantiate Raynor's statement—does not withstand scrutiny. Had petitioner moved for a new trial based on Raynor's statement, the district court could have determined the basis for Raynor's statement in the course of addressing petitioner's motion. Under these circumstances, a substantial question arises whether petitioner should be permitted to use Section 2255 to circumvent the time limitation of Rule 33. See *Bean* v. *United States,* 679 F.2d 683, 684 (7th Cir. 1982).

App. 3a). Indeed, in the course of resolving issues arising out of petitioner's discovery request, the district court directed the government to inquire of all the relevant investigative agencies, including the Coast Guard, whether there was any suspicion that the *Stonefield Lady* had been involved in drug smuggling, and that inquiry had yielded nothing. In addition, a Navy diver who had explored the submerged *Stonefield Lady* testified that he had discovered no evidence of marijuana or other contraband (Trial Tr. 374, 377, 382-383).

Petitioner made no effort at the Section 2255 hearing to establish that the prosecutor knew or should have known that Gore's testimony was perjured. Petitioner's only submission on this issue is speculation based upon the immunity agreement with Gore; he reasons (Pet. 8) that the government would not have granted Gore immunity for events surrounding the *Stonefield Lady* if it did not believe that the vessel had been involved in illegal activity. In reality, the government's immunity agreement with Gore did not even mention the *Stonefield Lady*. See note 2, *supra*, and App., *infra*, 1a. Although the terms of the agreement are broad enough to encompass the *Stonefield Lady*, they afford no support for the conclusion that the government knew about any illegal activities involving her.[8]

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[8]Similarly lacking in probative value regarding the government's knowledge of perjured testimony is the district court's opinion of Gore's testimony, expressed during Gore's perjury trial (see Pet. 8). Petitioner's belief that Gore's testimony was incredible on its face, even if that opinion was later shared by the district court, does not support the conclusion that the government knew of or had evidence of Gore's perjury. Moreover, the district court suggested that Gore's lack of candor worked to petitioner's advantage. "If anything, Gore restrained himself and really did not come clean with what he knew about [petitioner], because I watched him, you know. * * * [Gore] did not come clean * * * with what he knew about [petitioner's] involvement" (8/25/83 Tr. 6).

Having failed to prove that the government knew or should have known that Gore's testimony was perjured when he gave it, petitioner is entitled to relief only if he can show that the perjury rendered his trial fundamentally unfair. See *United States* v. *Addonizio*, 442 U.S. 178, 185 (1979). The district court's opinion below, as well as the court of appeals' decision on petitioner's direct appeal, demonstrate that petitioner cannot make that showing.

Gore's perjured testimony did not create a reasonable doubt of petitioner's guilt that did not otherwise exist. *United States* v. *Agurs*, 427 U.S. at 112-113.[9] Gore's perjury regarding the *Stonefield Lady* was relevant only to the issue of his credibility. But Gore's credibility already had been impeached,[10] and the jury already had learned that the

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[9]As the court of appeals stated, "the overwhelming evidence of guilt in this case belies any notion that the [cumulative impeachment] material might have created a reasonable doubt" of petitioner's guilt. *United States* v. *D'Antignac*, 628 F.2d at 436. Petitioner's suggestion (Pet. 12) that the only evidence of his involvement with the smuggling scheme was his mere presence at the scene of an arrest is fatuous. Third parties corroborated Gore's testimony that petitioner had been involved in Fort Myers with the preparation of the *Little Hornet* for its journey to Colombia (Trial Tr. 183, 184). Independent testimony also showed that a truck discovered at Kittles's Dock on the night of the arrests had been in petitioner's possession (Trial Tr. 186, 197-199). Moreover, petitioner was not just present at the scene of an arrest. He was present at a remote place at a late hour with a large truck just at the time that a large shipment of marijuana was being delivered. In addition, his arrival at a rendezvous that had been changed at the last minute cast even more doubt on any claim that he knew nothing about the plan.

[10]At the hearing on petitioner's Section 2255 motion, the following colloquy occurred between petitioner and the district court (8/25/83 Tr. 22):

> MR. D'ANTIGNAC: May I just ask one quick question, Your Honor?
>
> THE COURT: Sure.
>
> MR. D'ANTIGNAC: Do you think that if the jury had known that Mr. Gore had perjured himself in any part of my trial, that they would have reached the same verdict?

government had entered into an extensive immunity agreement with Gore that included his involvement in this as well as any other drug smuggling activities during the time period covered by the agreement. As part of his defense, petitioner had attempted to impeach Gore with testimony regarding the *Stonefield Lady*. There was evidence that the Coast Guard had received reports that the boat had been loaded with marijuana and that Gore had failed to salvage the vessel when told that it had been found sinking in the Gulfstream (Trial Tr. 356, 361, 366). Indeed, the cross-examination regarding the *Stonefield Lady* was so extensive that the district judge commented that "[w]hen you read the transcript of that trial, two-thirds of it involved * * * Gore and the STONEFIELD LADY. I heard the STONEFIELD LADY so many times during the trial * * *, it just almost drove me deaf " (8/25/83 Tr. 6). Thus, petitioner's argument, like his *Brady* claim that he was prejudiced by the district court's denial of additional evidence impeaching Gore, "could be described as cumulative at best." *United States* v. *D'Antignac*, 628 F.2d at 436.[11]

THE COURT: Yes. They did not place a lot of stock in him. You watched him; I did. And I watched Gore — for gosh sakes, why the Government would ever make a deal with a man like him, I do not know — from what he produced in that case — because frankly, if they had come up and said that he had reneged on his agreement, I believe I would have sustained them, because that jury did not place any stock in Jack Gore. And you know that community did not place any stock in Jack Gore, better than anybody.

[11]Petitioner contends (Pet. 9) that the district court's finding that Gore's statement was material for purposes of 18 U.S.C. 1621 was inconsistent with its conclusion below that Gore's statement was simply cumulative impeachment testimony. Petitioner is mixing apples and oranges. That a false statement is material for purposes of a perjury prosecution—that is, *capable* of influencing the tribunal on the issue before it—does not mean that on the record of this case it *actually* had that effect.

Petitioner's claim boils down to an argument that it is unfair that he was convicted at a trial at which a witness perjured himself. But due process does not guarantee a trial without irregularities. "The only pertinent guarantee is that aspect of due process which makes a conviction unconstitutional 'if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt,' *Jackson* v. *Virginia*, 443 U.S. 307, 324 (1979), and [petitioner] is not challenging the inference of guilt from the 'record evidence adduced at the trial.' " *Bean* v. *United States*, 679 F.2d 683, 685 (7th Cir. 1982). Thus, the courts below correctly refused to set aside petitioner's conviction.[12]

2. Petitioner's argument (Pet. 16-17) that there were insufficient facts, absent Officer Swigert's erroneous assumption that shrimping was out of season, to constitute reasonable suspicion for the boarding of the *Little Hornet* under 19 U.S.C. 1581(a) is an entirely fact-bound question that does not merit further review. Petitioner had a full and fair

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[12]Also inapt is petitioner's reliance on *Mesarosh* v. *United States*, 352 U.S. 1 (1956), in which this Court reversed a conviction upon the Solicitor General's presentation of extensive evidence of perjury by the government's paid informer in other proceedings occuring subsequent to petitioners' trial. That the Court's decision was based upon its belief that the witness's probable perjury at petitioners' trial was material is demonstrated by the fact that the Court distinguished cases, such as the instant one, in which a defendant presented untruthful statements by a government witness as newly discovered evidence affecting the witness's credibility. When such statements are " 'merely cumulative or impeaching,' " they do not form an adequate basis for the grant of a new trial. 352 U.S. at 9. See also *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341, 357 (1963).

This case, which does not involve a claim that the government knew of, but failed to produce, *Brady* material, is distinguishable from *United States* v. *Bagley*, cert. granted, No. 84-48 (Nov. 13, 1984), and *United States* v. *Pflaumer*, cert. pending, No. 84-1033. Thus, this petition need not be held for disposition of those cases.

opportunity to litigate this issue at trial and on direct appeal, and it is not open to him to seek to relitigate it on this collateral attack (*Stone* v. *Powell*, 428 U.S. 465 (1976)), especially since whether or not shrimping was in season cannot be considered newly discovered evidence. In any event, as the district court noted (Pet. App. 4a), a broad array of factors supported Officer Swigert's reasonable suspicion, and no single factor was determinative. Moreover, petitioner's argument is no longer tenable in light of *United States* v. *Villamonte-Marquez*, 462 U.S. 579 (1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

GLORIA C. PHARES
Attorney

FEBRUARY 1985

DOJ-1985-02

APPENDIX

TO: Randall M. Clark
P.O. Box 384
Brunswick, GA., 31520

RE: JACK GORE

Dear Mr. Clark,

As chief of the Criminal Section of the U.S. Attorney's Office, Southern District of Georgia, I Elizabeth Calhoun Chaulker, agree and promise that Mr. Jack Gore will be granted transactional immunity, State and Federal, from prosecution for any offenses related to the Control Substances Act, State and Federal, up to and including June 10, 1978 and specifically including December 1977 and January of 1978. This office further agrees under the auspices of the United States Customs Bureau to return to Mr. Jack Gore the shrimp trawler the Little Hornet which was seized on June 10, 1978 without fine or penalty and to withdraw the assessment of 11 million, 3 hundred, 12 thousand Dollars said assesment being the levy on 6-15-78. The U.S. Attorney's Office, Southern District of Georgia, and the Department of Justice, further agrees not to prosecute Lenon Skinner, Ricky Skinner, Sherrel Flemming or Christene Skinner for their particpation in the case of the June 10, 1978 marijuana seizure from the shrimp trawler the Little Hornet.

In return for the affisaid agreement and promise, Mr. Jack Gore agrees to cooperate fully with the depart of Justice in connection with the investigation of the December

1977 and January 1978 transaction and the marijuana conspiracy occurring on or about June 9 or 10, 1978. Mr Gore agrees to testify if necessary in the trial of the above mentioned trasaction. No civil penalties will be assessed against Jack Gore for any of the above.

/s/

Elizabeth Calhoun Chaulker